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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 JOSE FIGUEROA,

12 Plaintiff,

13 vs.  
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16 MELISSA LEA, Warden,

17 Defendant.  
18

CASE NO. 10 CV 2274 MMA (JMA)

**ORDER DENYING  
PETITIONER'S APPLICATION  
FOR CERTIFICATE OF  
APPEALABILITY**

[Doc. No. 21]

**GRANTING PETITIONER'S  
MOTION TO STAY  
ENFORCEMENT OF  
SEPTEMBER 21, 2011 ORDER**

[Doc. No. 23]

19 **BACKGROUND**

20 On November 3, 2010, Petitioner Jose Alfredo Figueroa, a state prisoner proceeding *pro*  
21 *se*, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his  
22 February 1, 2008 state court conviction. [Doc. No. 1.]<sup>1</sup> On November 29, 2010, Petitioner filed a  
23 motion to proceed IFP, which the Court granted on December 13, 2010. [Doc. Nos. 5, 6.] On  
24 February 16, 2011, Petitioner filed a motion to stay and abey his entire federal habeas petition  
25 while he returns to state court to exhaust his remedies with respect to six unexhausted claims in the  
26 mixed petition. [Doc. No. 8.] Respondent filed a response to Petitioner's motion on April 27,

27  
28 <sup>1</sup> The facts underlying Petitioner's state conviction and his subsequent challenges to the  
conviction are set forth in Judge Adler's Report and Recommendation [Doc. No. 15] and the  
undersigned's Order adopting the report [Doc. No. 19].

2011. [Doc. No. 13.] The matter was referred to United States Magistrate Judge Jan M. Adler for preparation of a Report and Recommendation under 28 U.S.C. § 636(b) and Civil Local Rule 72.1(d). On September 21, 2011, the undersigned adopted the Report and Recommendation in its entirety. The Court granted Petitioner's motion to stay and abey, in part, with respect to his exhausted first and second grounds for relief. The Court denied Petitioner's motion to stay and abey, in part, with respect to the six unexhausted claims based on the finding that Petitioner failed to demonstrate good cause for his delay in pursuing these six additional grounds for relief. [Doc. No. 19.]

#### **CERTIFICATE OF APPEALABILITY**

On October 25, 2011, Petitioner filed a notice of appeal, together with several motions, including a request for this Court to issue a certificate of appealability. [Doc. No. 21.] "The district court must issue or deny a certificate of appealability when it enters a *final* order adverse to the applicant." Rule 11 foll. 28 U.S.C. § 2254 (emphasis added). A petitioner may not seek an appeal of a claim arising out of state court detention unless the petitioner first obtains a certificate of appealability from a district judge or a circuit judge under 28 U.S.C. § 2253. Fed. R. App. P. 22(b). Upon due consideration, the Court concludes a certificate of appealability should not issue.

For the reasons set forth in the Report and Recommendation and the Court's September 21, 2011 Order adopting the Report, the Court finds reasonable jurists would not find it debatable that Petitioner has not shown an entitlement to federal habeas corpus relief as to his six unexhausted claims. 28 U.S.C. § 2253; Fed. R. App. P. 22(b). Accordingly, the Court declines to issue a certificate of appealability, and **DENIES** Petitioner's motion [Doc. No. 21].

#### **MOTION TO STAY**

Petitioner also filed a motion to stay enforcement of the Court's September 21, 2011 Order adopting the Report and Recommendation pending his appeal. Although the Court does not find a certificate of appealability should issue, and therefore an appeal is not warranted, the Court will stay Petitioner's time to withdraw his unexhausted claims as set forth in the Court's September 21 Order until his appeal is terminated. Accordingly, Petitioner's motion to stay [Doc. No. 23] is **GRANTED**.

**CONCLUSION**

For the reasons set forth above, the Court **ORDERS** as follows:

- (i) The Court **DENIES** Petitioner's request for the Court to issue a certificate of appealability [Doc. No. 21];
- (ii) The Court **GRANTS** Petitioner's motion to stay enforcement of the Court's September 21, 2011 Order until his appeal is terminated [Doc. No. 23].

**IT IS SO ORDERED.**

DATED: October 28, 2011



Hon. Michael M. Anello  
United States District Judge